LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 2 1964
JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 220

LAWRENCE W. BAGGETT, ROCKY BAUER, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, JAY PATRICK DONALEY DAVID M. EAYES, JOHN M. EMLEM, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVIN MILOWE, ROBERTA MILOWE, WAYNE C. MULLER, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE, *Appellants*,

v.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, E. A. ADDINGTON, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS, *Appellees*.

ON DIRECT APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

# BRIEF OF APPELLEES

JOHN J. O'CONNELL,
*Attorney General*,
HERBERT H. FULLER,
*Deputy Attorney General*,
DEAN A. FLOYD,
*Assistant Attorney General*,
*Attorneys for Appellees*.
Office and Post Office Address: Temple of Justice, Olympia, Wash.

# In the Supreme Court of the United States

OCTOBER TERM, 1963

NO. 220

LAWRENCE W. BAGGETT, ROCKY BAUER, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, JAY PATRICK DONALEY, DAVID M. EAVES, JOHN M. EMLEM, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LITTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVIN MILOWE, ROBERTA MILOWE, WAYNE G. MULLER, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON. BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE, *Appellants*,

v.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, E. A. ADDINGTON, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS, *Appellees*.

ON DIRECT APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

# BRIEF OF APPELLEES

JOHN J. O'CONNELL,
*Attorney General*,
HERBERT H. FULLER,
*Deputy Attorney General*,
DEAN A. FLOYD,
*Assistant Attorney General*,
*Attorneys for Appellees*.

Office and Post Office Address: Temple of Justice, Olympia, Wash.

# SUBJECT INDEX


Page

INTRODUCTION ..... 9

PART I. ADDITIONS AND CORRECTIONS TO EMPLOYEES' STATEMENT OF THE CASE ..... 10

Statutes and Litigation Relating to Subversive Activities Since World War II ..... 10

A. Statutes ..... 10

B. Prior Litigation ..... 14

C. The Oaths ..... 14

D. The "Refusal" to Sign ..... 17

E. The Employees ..... 19

PART II. SUMMARY OF ARGUMENT ..... 20

PART III. THE 1951 ACT, AND THE PORTION OF THE OATH BASED THEREON, ARE NOT PROPERLY BEFORE THIS COURT ..... 26

PART IV. THERE IS NO ACTUAL CONTROVERSY ..... 30

The Disclaimer Oath ..... 30

The 1931 Oath ..... 34

PART V. THE 1955 ACT AND THE 1931 ACT DO NOT VIOLATE THE FIRST AMENDMENT ..... 35

The Case Law Is Overwhelming to the Effect that the Disclaimer Provision of the 1955 Act Does Not Violate the First Amendment ..... 35

The 1931 Act Does Not Violate the First Amendment 41

The 1955 Act Is Not an Unconstitutional Prior Restraint ..... 41

The Oaths Do Not Violate the First Amendment Guarantees on Religion ..... 45

The Interest to Be Protected is Substantial ..... 47

PART VI. THE 1955 ACT AND THE 1931 ACT DO NOT VIOLATE THE FOURTEENTH AMENDMENT 50

The Employees Who Refuse to Sign the Disclaimer Oath Are Probably Entitled to a Hearing ..... 50

Whether an Employee Who Refuses to Sign the 1931 Oath Would be Entitled to a Hearing is a Matter for Conjecture ..... 58

The 1955 Act Does Not Violate Constitutional Guarantees as to Vagueness ..... 58

The 1931 Act Does Not Violate Constitutional Guarantees as to Vagueness ..... 67

The 1955 Act and the 1931 Act Do Not Involve an Unconstitutional Shifting of the Burden of Proof 69

The 1931 Act Involves Neither a Deprivation of Substantive Due Process Nor a Denial of Equal Protection Under the Law ..... 70

Page

PART VII, OTHER CONTENTIONS OF EMPLOYEES. 73
The 1955 Oath Requirement Does Not Constitute a Bill of Attainder ..... 73
There Has Been No Pre-emption of the 1955 Act ..... 77
The 1955 Act Does Not Require Self-Incrimination ..... 79
The District Court was Correct in Dismissing Employees' Complaint With Prejudice ..... 80
The District Court Was Correct in Dismissing the Students ..... 81
CONCLUSION ..... 82

## TABLE OF AUTHORITIES CITED

### CASES

Adamson v. California, 332 U. S. 46 ..... 80
Adler v. Board of Education, 342 U. S. 485 ..... 21, 22, 32, 33, 35, 37, 39, 48
American Communications Assn. v. Douds, 339 U. S. 382 ..... 22, 27, 44, 48, 57, 61, 69, 76
Arkansas Fuel Oil Co. v. La. ex rel. Muslow, 304 U. S. 197 ..... 28
Barenblatt v. United States, 360 U. S. 109 ..... 40
Bates v. Little Rock, 361 U. S. 516 ..... 35
Beilan v. Board of Education, 357 U. S. 399 ..... 21, 22, 36, 37, 39, 40, 80
Board of Governors of Federal Reserve System v. Agnew, 329 U. S. 441 ..... 56
Braden v. United States, 365 U. S. 431 ..... 40
Bridges v. California, 314 U. S. 252 ..... 48
Bryant v. Zimmerman, 278 U. S. 63 ..... 36
Cafeteria Workers v. McElroy, 367 U. S. 886 ..... 57
Carr v. Young, 364 U. S. 479 ..... 34
Cohen v. Hurley, 366 U. S. 117 ..... 80
Communist Party v. Subversive Activities Control Board, 367 U. S. 1 ..... 40, 47, 48, 80
Corwin Investment Co. v. White, 166 Wash. 195, 6 P. (2d) 607 ..... 29
Cramp v. Florida, 368 U. S. 278 ..... 16, 23, 58, 59, 65
Cummings v. Missouri, 71 U. S. (4 Wall.) 277 ..... 73
Daniel v. Family Security Life Ins. Co., 336 U. S. 220 ..... 73, 82
Dennis v. United States, 341 U. S. 494 ..... 27, 60
Engel v. Vitale, 370 U. S. 421 ..... 46

## TABLE OF AUTHORITIES CITED—*Continued*

### CASES


Page

Ex parte Garland, 71 U. S. (4 Wall.) 333 ..... 73

Fox v. Washington, 236 U. S. 273 ..... 55, 62

Garner v. Board of Public Works, 341 U. S. 716 ..... 21, 22, 36, 37, 44, 48, 61, 69, 75, 76

Gerende v. Board of Supervisor of Elections, 341 U. S. 56 ..... 36, 56, 69, 80

Gitlow v. New York, 268 U. S. 652 ..... 61

Gnecchi v. State of Washington, 58 Wn. (2d) 467, 364 P. (2d) 225 ..... 57

Household Finance Corporation v. State of Washington, 40 Wn. (2d) 451, 244 P. (2d) 260 ..... 62

In re Anastaplo, 366 U. S. 82 ..... 35, 80

In re Christensen, No. 34575, Thurston County Superior Court, State of Washington ..... 55

Jordan v. DeGeorge, 341 U. S. 223 ..... 68

Konigsberg v. California, 353 U. S. 252 ..... 35

Konigsberg v. California, 366 U. S. 36 ..... 35, 80

Lanzetta v. New Jersey, 306 U. S. 451 ..... 62

Lerner v. Casey, 357 U. S. 468 ..... 80

Martin v. Creasy, 360 U. S. 219 ..... 80

McNeal v. Culver, 365 U. S. 190 ..... 28

National Assn. for Advancement of Colored People v. Alabama, 357 U. S. 449 ..... 35, 36, 42

New York Rapid Transit Corp. v. City of New York, 303 U. S. 573 ..... 73

North Bend Stage Line v. Dept. of Public Works, 170 Wash. 217, 16 P. (2d) 206 ..... 29

Nostrand v. Balmer, 53 Wn. (2d) 460, 335 P. (2d) 10 ..... 11, 14, 16, 30, 75, 79

Nostrand v. Little, 58 Wn. (2d) 111, 361 P. (2d) 551 ..... 14, 30, 31, 32, 51, 52, 57, 58

Nostrand v. Little, 362 U. S. 474 ..... 14, 80

Nostrand v. Little, 368 U. S. 436 ..... 14, 80

Noto v. United States, 367 U. S. 290 ..... 27

Pennsylvania v. Nelson, 350 U. S. 497 ..... 24, 77, 78

## TABLE OF AUTHORITIES CITED—*Continued*

### CASES


| | Page |
|---|---|
| Phillips Chemical Co. v. Dumas Ind. Sch. Dist., 361 U. S. 376 | 73 |
| Poe v. Ullman, 367 U. S. 497 | 81 |
| Re Summers, 325 U. S. 561 | 22, 46 |
| Scales v. United States, 367 U. S. 203 | 27 |
| Shelley v. Kraemer, 334 U. S. 1 | 28 |
| Shelton v. Tucker, 364 U. S. 479 | 22, 34, 39, 41, 42, 43 |
| Shub v. Simpson, 196 Md. 177, 76 A. (2d) 322, 340 U. S. 861 | 59 |
| Shuttlesworth v. Birmingham Board of Education, 358 U. S. 101 | 63 |
| Speiser v. Randall, 357 U. S. 513 | 17, 21, 24, 41, 42, 69, 70 |
| State v. McCarthy, 38 N. W. (2d) 679, (255 Wis. 234) | 67, 68 |
| State v. Wallis, 50 Wn. (2d) 350, 311 P. (2d) 659 | 66 |
| Stromberg v. Calif., 283 U. S. 359 | 62 |
| Sweezy v. New Hampshire, 354 U. S. 234 | 25, 37, 38, 42, 77 |
| Times Film Corporation v. Chicago, 365 U. S. 43 | 42 |
| Twining v. New Jersey, 211 U. S. 78 | 80 |
| United Gas Pipe Line Co. v. Ideal Cement Co., 369 U. S. 134 | 34, 56, 80 |
| United Public Workers v. Mitchell, 330 U. S. 75 | 35, 37, 56 |
| United States v. Lovett, 328 U. S. 303 | 73, 74, 75, 76, 77 |
| United States v. Johnson, 319 U. S. 302 | 81 |
| United States v. Spector, 343 U. S. 169 | 28 |
| Uphaus v. Wyman, 360 U. S. 72 | 25, 77, 78 |
| Weiman v. Updegraff, 344 U. S. 183 | 13, 16 |
| West Virginia State Board of Education v. Barnette, 319 U. S. 624 | 21, 41, 47 |
| Whitney v. California, 274 U. S. 357 | 61 |
| Wilkinson v. United States, 365 U. S. 399 | 40 |
| Winters v. New York, 333 U. S. 507 | 62 |
| Wong Yang Sung v. McGrath, 339 U. S. 33 | 57 |
| Yates v. United States, 354 U. S. 298 | 27 |

# WASHINGTON STATUTES


Page

Laws of 1919, Chapter 38 ..... 72
Section 1 ..... 72
Laws of 1931, Chapter 103 .....
10, 19, 21, 22, 24, 25, 34, 35, 58, 67, 68, 69, 70, 72, 80
Chapter 119 ..... 29
Laws of 1947, Chapter 287 ..... 11
Section 2, p. 1334 ..... 11
p. 1378 ..... 11
Laws of 1949, Chapter 32 ..... 72
Laws of 1951, Chapter 254 .....
.....10, 12, 15, 16, 20, 26, 27, 28, 29, 30, 31, 41, 45, 50, 62
Section 11 ..... 16
Section 12 ..... 10, 16, 43
Section 13 ..... 16
Section 19 ..... 63
Laws of 1953, Chapter 142 ..... 13, 16
Laws of 1955, Chapter 377 ..... 10, 11, 13, 14, 15, 16, 19, 20, 22, 23, 25, 26, 27, 28, 29, 30, 31, 35, 37, 39, 41, 47, 49, 50, 52, 55, 58, 59, 65, 69, 70, 73, 75, 77, 79, 81
Section 1 ..... 16, 57
Section 9 ..... 57
Laws of 1959, Chapter 234 ..... 23, 52, 55, 58
Laws of 1961, Chapter 1 ..... 23, 52, 58
Section 5 ..... 53
Sections 18, 19, 20, and 21 ..... 54
Chapter 18.85 Revised Code of Washington ..... 56
Revised Code of Washington 9.72.010 et seq ..... 67
Revised Code of Washington 9.81.010(3) ..... 65
Revised Code of Washington 9.81.010(5) ..... 66
Revised Code of Washington 9.81.070 ..... 10
Revised Code of Washington 28.67.010 et seq ..... 72
Revised Code of Washington 28.67.020 ..... 72
Revised Code of Washington 28.70.150 et seq ..... 10, 34
Revised Code of Washington 28.77.120 ..... 52
Revised Code of Washington 28.77.130 ..... 52

## UNITED STATES CONSTITUTION

Page

United States Constitution, First Amendment ..... 17, 20, 21, 22, 36, 40, 43, 63

United States Constitution, Fifth Amendment .. 25, 37, 79, 80

United States Constitution, Fourteenth Amendment ..... 17, 21, 22, 25, 40, 63

## MISCELLANEOUS

Annotation, 3 L. ed. 2d 1827 ..... 80

Brown, R. S., Jr., Loyalty and Security, p. 94 ..... 49

Brown, R. S., Jr., Loyalty and Security, p. 99 ..... 45

First Report Un-American Activities in Washington (1948) ..... 11, 22, 47, 48

70 C.J.S. 462 § 6 ..... 67

Cramton, 43 Minn. L. Rev. 1025 ..... 78

Dodds, 28 Law and Contemporary Problems 605 ..... 44

Hensel, 28 Rocky Mt. L. Rev. 258 ..... 74

House Bill 264 (Washington) ..... 12

House Journal, 1949, p. 1095 et seq. (Washington) ..... 11, 48

House Journal, 1951, p. 23 (Washington) ..... 12

98 L. ed. 374 ..... 68

Laws of Maryland, 1949, Chapter 86, 1949 Anno. Code of Md. Article 35A ..... 12, 59

Second Report Un-American Activities in Washington (1948) ..... 11, 22, 47, 48

Senate Bills 361, 378, 356 (Washington) ..... 12

Senate Journal, 1955, p. 34 (Washington) ..... 13

Silving, 68 Yale L. Jour. 1329 ..... 15

54 Stat. 671, 18 U.S.C. 2385 (Supp.) (Smith Act) ..... 59, 60

81 Stat. 146, Chapter 120 ..... 44

1 Sutherland, Statutory Construction, 442 § 1937, 3rd ed. 1943 ..... 29

29 U.S.C.A. 159 (8) ..... 44

# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 220

LAWRENCE W. BAGGETT, ROCKY BAUER, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, JAY PATRICK DONALEY, DAVID M. EAVES, JOHN M. EMLEM, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. McMINN, IRVIN MILOWE, ROBERTA MILOWE, WAYNE C. MULLER, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE, *Appellants*,

v.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, E. A. ADDINGTON, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS, *Appellees*.

ON DIRECT APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

# BRIEF OF APPELLEES

## INTRODUCTION

For convenience, appellants shall be called "Employees." For the same reason appellees shall be called "Regents" even though they include, in addition, the President of the University of Wash-

ington and the Attorney General. The duty of the Attorney General is to defend legislative enactments against attack on grounds of unconstitutionality. The statutory duty of the Regents is to administer the legislative enactments in question.

The term "1931 oath" refers to the oath required by chapter 103, Laws of the State of Washington 1931. (Cf. RCW 28.70.150 et seq.) "Disclaimer oath" or "1955 oath requirement" refers to the oath required by section 12, chapter 254, Laws of the State of Washington 1951, as amended by chapter 377, Laws of the State of Washington 1955. (Cf. RCW 9.81.070) "Subversive Activities Act" refers to the 1951 act, as twice amended.

## PART I

## ADDITIONS AND CORRECTIONS TO EMPLOYEES' STATEMENT OF THE CASE

It is necessary to deal, in this section, with the statutes enacted, and litigation relating to subversive activities arising since World War II, the 1955 oath, the "refusal" of Employees to sign the oaths and with the legal status of the Employees.

### STATUTES AND LITIGATION RELATING TO SUBVERSIVE ACTIVITIES SINCE WORLD WAR II

#### A. Statutes

It is necessary to consider chronologically the statutes and the litigation involving subversive activities since World War II. Chapter 377, Laws of

1955 cannot be viewed in a vacuum. It is amendatory and it is only one of a number of acts passed over a period of years since World War II. It is necessary to examine these other acts as well and to consider their legislative background. (See *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10, at p. 465 *et seq.*)

In 1947 the legislature passed the first of these measures. (Laws of 1947, chapter 287, section 2, p. 1334.) It was a proviso in the appropriation act forbidding public funds from reaching public employees who advocated, or who were members of organizations which advocated, the overthrow of the government of the United States by force or violence. During the same session, the legislature, through House Concurrent Resolution No. 10, created a joint fact-finding committee on un-American activities. (Laws of 1947, p. 1378) This committee held extensive hearings, involving many witnesses.

The committee reported its extensive findings and recommendations to the 1949 session of the legislature. (House Journal 1949, p. 1095.) On page 1095, the committee incorporated by reference two lengthy printed reports containing a stenographic transcript of the hearings, the *First Report Un-American Activities in Washington State, 1948*, and *The Second Report, Un-American Activities in Washington State, 1948*. The *First Report* and *Second Report* are a part of the record in this case, though, because of their bulk, not the printed record.

In 1949 the legislature enacted a proviso, as part of its appropriation act, similar to that adopted by the legislature in 1947. During that session four separate bills were introduced to continue this committee (House Bill No. 264; Senate Bills 361, 378 and 356, this last by title only). Not one became law.

In 1951 the Governor in his message to the legislature urged the legislature to "give thought to enactment of appropriate provisions for the curbing of subversive activity, and to protect our free institutions from perversion into weapons of aggression against us in the hand of our enemies." He further pointed out that,

> "By Concurrent Resolution No. 10, the Thirtieth Legislature created the Joint Legislative Fact Finding Committee on Un-American Activities. Through the labors of this committee much was learned of the degree to which disloyal groups had infiltrated into organizations of our senior citizens, into various economic and educational groups. As the result of these disclosures, some remedial action was taken but in the light of the grave emergency which we now face, additional action must be taken immediately. * * *" (*House Journal 1951*, beginning at p. 23).

A bill was introduced by executive request which later became chapter 254, Laws of 1951. This act is very similar to Maryland's Ober Act. (Chapter 86, Laws of Md. 1949, Anno. Code of Md., Article 85A.) Five of the original twenty-two sections, namely, sections 6, 7, 8, 10 and 21 were vetoed. The Court will note that it is a broad act relating to many matters in addition to public employees.

In 1953, after this Court's decision in *Wieman v. Updegraff*, 344 U. S. 183, the legislature passed chapter 142, Laws of 1953, amending the definition of "subversive person," to make the element of scienter more clear.

In 1955, the Governor, in his message to the legislature, pointed out that "* * * the menace of communism looms as an ever greater threat to the future of the free world than the 'isms' of the past. The United States is giving, and must continue to give, leadership to the non-communist world. To do so, with ever increasing confidence and vigor, our nation must lead from strength, the strength from within that comes from a free people, spiritually strong and functioning through the soundest set of governmental institutions yet developed by man. * * *" (*Senate Journal*, 1955, p. 34.) During this session chapter 377, Laws of 1955, one of the acts in question was passed.

In the years since World War II, the legislature, responding to world conditions, has passed several measures relating to subversive activities. The approach has been pragmatic. It began with a proviso in the budget, followed by a fact-finding committee which was discontinued two years later. After the Korean conflict began a comprehensive act was passed, which in turn has been twice amended. The pattern was formed over many years and was based upon experience. No such legislation has been passed in almost a decade.

## B. Prior Litigation

The 1955 Act was unsuccessfully attacked in 1955 by two University of Washington professors. They prevailed in the State Superior Court, but the federal constitutional questions which they raised in that case were decided adversely to them by the Washington State Supreme Court. *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10. The plaintiffs there, who were professors with tenure at the university, appealed to this Court. This Court vacated the decision of the State Supreme Court and remanded the case for consideration of the question of whether state employees required to sign such an oath are entitled to a hearing at which refusal to take the oath could be explained or defended. *Nostrand v. Little*, 362 U. S. 474. Pursuant to this remand, the Washington Supreme Court answered the question in the affirmative. *Nostrand v. Little*, 58 Wn. (2d) 111, 361 P. (2d) 551. As to all other issues involved in the case, the State Supreme Court adhered to the views expressed in its earlier opinion.

An appeal was again taken to this Court. On January 22, 1962, this Court granted the State Attorney General's motion to dismiss. This Court dismissed the appeal "for want of a substantial federal question." *Nostrand v. Little*, 368 U. S. 436.

## C. The Oaths

The Court has before it two oath requirements. The oath required by the 1931 statute is promissory

in form, while the 1951 statute, as amended by the 1955 statute requires a disclaimer oath. In the former, the person taking oath promises *inter alia* to support the constitution and to promote respect for the flag. Only teachers need take this oath. In the latter, one disclaims *inter alia* present membership in certain organizations and disclaims the commission of certain acts relating to violent overthrow. All state and local employees and officials must take this disclaimer oath.

This is not the proper place to trace the history of the oath. (This was done very admirably by Professor H. Silving in 68 Yale L. Jour. 1329.) It is sufficient here to point out that the history of the oath goes back to the pre-religious, even the pre-animate period of culture. The oath was thought by primitive man to be a vehicle of magic power. Despite the fact that the oaths before the court have little or no resemblance to their early ancestors it is small wonder that even today the term "oath" or "loyalty oath" is heavily charged with emotion. The word "affidavit," stemming from the Latin, has the same meaning but lacks the connotations. But "loyalty oath" and "oath of allegiance" are the terms in popular use.

The 1955 statute does not prescribe any particular oath forms. The state attorney general has provided a suggested form to the state printer. This suggested oath form has been revised at least twice by the state attorney general. The state printer in turn supplies the oath forms to various agencies.

Some large agencies print their own oath forms, other agencies combine the oath form with an application form. Oaths are kept on file with the employing agency. Regents are unaware of any discharge based on refusal to sign the oath.

A person taking the oath swears to two facts: that he is not a subversive person as defined in the Act, and that he is not a member of the Communist Party or of any other subversive organization. Only the second fact is required by the 1955 Act. The former stems from sections 11 and 12 of the 1951 Act.

Section 13 of the 1951 Act concerns non-sensitive positions. No claim is made by Employees that the positions involved in this case are, or should be, non-sensitive.

The oath requirement contemplated by section 1 of the 1955 Act looks to the present. Thus, it is possible for a communist to resign from the Communist Party today and take the oath tomorrow. Unlike other oath requirements before this court past membership is not involved.

The oath so clearly satisfies the scienter requirements as a result of statutory amendment (chapter 142, Laws of 1953), judicial interpretation (*Nostrand v. Balmer, supra*, at p. 460, 470, 476 and 484) which this court must "accept without question" *Cramp v. Florida*, 368 U. S. 278, and the form of the oath itself, that Employees have made no claim that scienter is lacking. *Wieman v. Updegraff*, 344 U. S. 183 is, as a result, not applicable.

The oath requirement is pinpointed to a particular group, public employees, with regard to which the legislature not only has the right but the duty to set up qualifications. No attempt was made to cover a person not a public employee or official as in *Speiser v. Randall*, 357 U. S. 513.

### D. The "Refusal" to Sign

Regents proffered the oaths to the Employees and allowed them until October 1, 1962 to sign. Prior to October 1, 1962 the lower court enjoined the University from demanding the completion of the oaths, an injunction being presently in force. Hence, as the lower court noted, "Enforcement of the statutes by University officials, while clearly intended, is still prospective as a result of this litigation." (R. 241). Thus, there is nothing preventing any Employee from changing his mind today and deciding to take the oath, dispite his vehement statements of intention. (See R. 203.) Thus, the word "refusal" when it occurs in the pre-trial order and in the lower court opinion must be seen in the light of a threat, avowal, or statement of intention, subject to change at any moment, not as an actual irrevocable refusal. There is, at present, not one refusal on which discharge could be predicated. The "refusal" of the Employees is not an operative fact. In other words the demand for information is a certainty (and the First Amendment argument should be seen in this light) and the continued refusal and possible discharge is only a possibility (and the Fourteenth Amendment argu-

ment should be seen in this light). The question of whether there is an actual controversy is discussed in Part IV.

On May 28, 1962 a memorandum from the office of the President of the University of Washington to all members of the staff of that university was distributed. This memorandum provided in part as follows:

> "* * * To enable the Board of Regents to acquit itself of the responsibility placed upon it by law, a check of the personnel records of the University is in process so that those persons who have not previously sworn to the required oaths may be requested to do so. These requests will be submitted as soon as possible but surely no later than September 15, 1962. Since the end of the academic year will be reached in a few days and a substantial number of persons will go off the University payroll for the summer and may not even be in Seattle, compliance will be requested by October 1, 1962, with notification that in the event of failure to comply, employment will be terminated 30 days later as of October 31, 1962, unless a delay in taking action to terminate seems reasonable because of causes other than intentional refusal to sign." (R. 173)

This was further elaborated by the Provost of the University of Washington in a memorandum of June 4, 1962 directing university deans, directors and chairmen of departments to begin administering the oaths:

> "It is evident that the task of obtaining all of these notarized signatures will be protracted and time consuming. Therefore, I am sending

to you in this mail a supply of Oath Forms A and B with the suggestion that those who wish to complete the form prior to the October 1, 1962 deadline be encouraged to do so since it will reduce the costs of administration in meeting statutory requirements if as many persons as possible will complete the form in the course of the summer and thus reduce the 'crash' clerical operation which would otherwise have to be faced near October 1, 1962." (R. 163)

However, on June 25, 1962—several months prior to the October 1, 1962 deadline—a temporary restraining order was signed ordering that the Regents be "temporarily restrained from enforcing Chapter 103, Laws of 1931 and Chapter 377, Laws of 1955, of the State of Washington, by requiring the plaintiffs or others similarly situated to execute either Oath Form A or Oath Form B, * * *" (R. 36). On February 26, 1963 the three-judge district court ordered that "the enforcement of the judgment heretofore entered will be stayed for sixty days, subject to extension of the stay until final disposition of the case by the Supreme Court of the United States * * *" (R. 264).

There can be no legal refusal as long as there is no demand. And there can be no demand as long as the injunction is in force.

### E. The Employees

Two observations should be made. The record is silent as to the contract provisions of any of the Employees, although the Washington Supreme Court has indicated that these may be important in deter-

mining the nature of an employee's hearing rights. Second, Employees, by the very definition of the word, are not applicants. Thus, the question of the 1931 statute and the 1955 statute with regard to applicants is not before the Court.

## PART II

## SUMMARY OF ARGUMENT

The Employees cannot challenge the constitutionality of the provisions of the 1951 Act indirectly by challenging only the 1955 Act and the actions of administrators acting within the scope of the 1951 Act, as amended.

Despite the fact that the Washington Supreme Court has twice construed the 1955 Act with regard to tenured professors, the number and variety of questions not before that court which Employees are asking this Court to resolve, the declaratory nature of the case, the fact that the act under consideration is amendatory in nature, and especially the fact that there has been no actual refusal to sign, all lead to the conclusion that the questions relating to the disclaimer oath are not ripe for decision. With regard to the 1931 oath, this Court should affirm the lower court's decision to exercise equitable abstention. There has never been any litigation involving the validity of this oath, the present case alone excepted.

Neither the 1931 oath requirement nor the 1955 oath requirement involves a violation of the First

Amendment, as made applicable to the states by the Fourteenth Amendment. A distinction must be made between the state's constitutional right to demand certain information on pain of possible loss of employment (which involves First Amendment considerations) and the form and method by which the information is demanded (which involves the Fourteenth Amendment considerations). With regard to the former, precedent strongly supports the validity of the oaths. The Court's decisions in *Beilan v. Bd. of Education*, 357 U. S. 399, *Adler v. Bd. of Education*, 342 U. S. 485, and *Garner v. Bd. of Public Works*, 341 U. S. 716,—quite apart from the matter of the form of the inquiry—certainly hold that the inquiry may be made as a reasonable condition of employment to maintain the integrity of the civil service.

The 1931 Act does not violate the First Amendment because the state has a substantial and direct interest in having teachers who will inspire loyalty toward country on the part of students. In this regard there is a sharp distinction between the case at bar and *W. Va. State Board of Education v. Barnette*, 319 U. S. 624, since the latter case did not relate to a group, such as teachers, where special qualifications are involved, but rather to students. In this respect *Barnette* resembles *Speiser v. Randall*, 357 U. S. 513, in that the state attempted to set up a certain requirement affecting a broad segment of the public without demonstrating a convincing societal need.

The 1955 Act is not an unconstitutional prior restraint. *Shelton v. Tucker*, 364 U. S. 479, has no bearing on the present case since in the present case the means used by the state to effectuate its legitimate interest in combating subversion are reasonably tailored for this purpose.

The oaths do not violate the First Amendment guarantees on religion: They neither constitute a religious function nor do they, based upon *Re Summers*, 325 U. S. 561, interfere with the free exercise of religion.

The two reports of the Washington State Un-American Activities Committee leave no doubt that the interest to be protected is substantial. This Court has held in such cases as *Garner*, *Adler*, and *Douds*, all *supra*, that the societal interest in safeguarding the teaching profession against disloyalty and protecting against political strikes is substantial, indeed, and justified the means used to protect such interest.

Given the fact that a societal interest exists there can be no question that the means used are reasonably related to the protection of this interest; for the existence of a criminal sanction might give the subversive employee pause before signing the disclaimer oath.

Neither the 1955 Act nor the 1931 Act violates the Fourteenth Amendment. There is no violation of procedural due process since employees with academic tenure certainly are entitled to a hearing.

Employees with civil service tenure or no tenure at all are probably entitled to a hearing. The former group would probably be entitled to a hearing as a result of the State Civil Service Act (chapter 1, Laws of the State of Washington 1961) while the latter group would probably be entitled to a hearing as a result of the Administrative Procedures Act (chapter 234, Laws of the State of Washington 1959). There are indications that the Supreme Court of Washington would construe the Subversive Activities Act along with these more recent acts. Since a hearing will be available to the Employees it is not necessary to rely upon cases involving imposition of a civil disqualification without a right to a hearing. The question of whether an employee who refuses to sign the oath required by the 1931 Act would be entitled to a hearing is a matter for conjecture.

The 1955 Act is not unconstitutionally vague. *Cramp v. Florida*, 368 U. S. 278, is not applicable since the language of the oath involved there is much broader than the language involved in the present case. This Court has upheld penal statutes containing language roughly comparable to that involved in the present case. Once it is determined that the statutes are not void on their face this Court will assume that a statute will be interpreted by the highest state court in such a way as to avoid raising constitutional problems. The words used in the Subversive Activities Act, as amended, in no way render illegal or questionable the activities and associations

listed by the Employees. This, combined with the high measure of proof necessary to convict one of perjury, shows that Employees' fears of conviction of perjury are without a reasonable basis.

It cannot be argued that the 1931 Act is so vague as to render it unconstitutional since a violation of the oath, it being promissory in form, is not a crime. The 1955 Act and the 1931 Act do not involve an unconstitutional shifting of the burden of proof, since *Speiser v. Randall*, 357 U. S. 513, is not applicable; the present case involves public employees, a group specifically excepted by the Court in *Speiser*; it does not involve a segment of the general public, such as veterans, which bears no relation to a specific societal need such as combating disloyalty among public employees. The 1931 Act has been interpreted as being not applicable to aliens. However, employees who are citizens cannot claim that they are denied equal protection of the laws since it would be unfair to ask aliens as well as citizens to "promote * * * undivided allegiance to the government of the United States."

Nor are other contentions of the Employees valid. The oaths are not Bills of Attainder since they do not involve punishment but rather a qualification for employment. In addition they look to the present, they are not retrospective.

The pre-emption argument based upon *Pennsylvania v. Nelson*, 350 U. S. 497, is not valid because that case has been reduced to its precise facts by

*Uphaus v. Wyman*, 360 U. S. 72, and *Sweezy v. New Hampshire*, 354 U. S. 234.

The 1955 Act does not violate the constitutional prohibition against self-incrimination; for the Employees are not asked to testify against themselves. They must, however, comply with the standards of eligibility established by the legislature. There is no inquiry into past conduct. Finally, the clause of the Fifth Amendment protecting a person against being compelled to be a witness against himself is not made effective by the Fourteenth Amendment as a protection against state action.

The district court was correct in dismissing Employees' complaint with prejudice since the court decided against Employees on the merits with regard to the 1955 Act. With regard to the 1931 Act the fact that the court invoked the doctrine of equitable abstention would only seem to preclude the Employees from bringing another federal court action. It would force them to go up through the state courts.

Finally, the district court was correct in dismissing the students since the statutes involved here directly affect the Employees but the effect on the students is remote and speculative.

## PART III

## THE 1951 ACT, AND THE PORTION OF THE OATH BASED THEREON, ARE NOT PROPERLY BEFORE THIS COURT

The Employees are asking this Court to declare portions of the 1951 Act unconstitutional despite the fact that the 1951 statute is not before the Court. One searches the pleadings and the pre-trial order in vain for a clear request that it be declared unconstitutional. Employees have now tried subtly to broaden their attack. Thus the statement is made that "the definitional sections of the 1951 Act, set forth above and *incorporated into* the 1955 Act * * *" (App. Br. p. 34) (Emphasis supplied) In other portions of this brief the Employees have asked this Court to pass on the constitutionality of those very definitional sections. (App. Br. p. 67-78, for example) The Employees have thus begged the question of whether, under state law, the portions of the original statute set out in the amendatory act along with the new matter fall along with the new matter, if the latter is found unconstitutional. The Employees have begged the question of whether, under state law, one may attack the definitional sections "through the back door" by attacking the words defined as they appear in an amendatory act even though the definitional sections, themselves, are not a part of such amendatory act.

One aspect of this broadening attack is presented by the Employees' treatment of criminal sanctions.

One is protected against the imposition of a criminal sanction by a panoply of constitutional guarantees which are not applicable to the imposition of a civil disqualification such as loss of public employment. This is true even though the latter may, on occasion, be more drastic than the former.

Quite apart from the crime of perjury, the 1951 statute contains certain criminal provisions based on knowing membership in a subversive organization which, to be candid, would pose constitutional questions if they were before this Court, in view of *Noto v. U. S.*, 367 U. S. 290 and *Scales v. U. S.*, 367 U. S. 203. Employees have made frequent reference to them as if they had somehow attainted the statutory provisions in question. (App. Br. p. 76 where Employees cite the criminal cases of *Scales*, *Noto*, both *supra*, *Yates v. U. S.*, 354 U. S. 298, and *Dennis v. U. S.*, 341 U. S. 494, as authority for the proposition that a civil disqualification may not be imposed.)

In addition to creating confusion, Employees' failure to challenge the 1951 Act directly creates two serious questions. First, can this Court on this record invalidate the 1951 Act? Second, assuming that the Court cannot, how would invalidation of the 1955 Act affect the 1951 Act?

We submit that the Court cannot invalidate the 1951 Act. Employees have challenged an administrative measure, namely, the oath as formulated, without challenging the statute upon which the administrative action is based. While this type of challenge is common enough where the administrator

has exceeded the bounds of his authority, and is not acting within the scope of his statutory authority, it is surely a rarity where, as here, no claim is made that the action of the administrator is without statutory foundation. On the contrary, they have, by way of argument, attempted to challenge the definitional provisions of the 1951 Act. It would be a bizarre decision which struck down an administrative measure clearly based upon an unchallenged statute; it would be an even more bizarre decision which invalidated a statute not before the court on the basis of an administrative act. A portion of the oath is so directly bound to the 1951 Act, as pointed out earlier, that to challenge this portion of the oath, the Employees must challenge the 1951 Act. This they have not done. This they cannot do for two reasons.

In the first place, Employees did not challenge the 1951 Act in the lower court and may not do so for the first time on appeal. *Shelley v. Kraemer*, 334 U. S. 1. In addition, Employees have not directly challenged the 1951 Act in their appeal to this Court. The question is thus not raised. *U. S. v. Spector*, 343 U. S. 169. The question, at best, lurks in the record, and this is not sufficient. *McNeal v. Culver*, 365 U. S. 190. This Court is rightly reluctant to pass upon constitutional issues which are not squarely presented by the record. *Arkansas Fuel Oil Co. v. La. ex rel. Muslow*, 304 U. S. 197.

The other question to be considered is, how would invalidation of the 1955 Act affect the 1951 Act?

The general rule, supported by Washington cases is: if the amendatory act is wholly invalid, the statute sought to be amended is held to remain in full force and effect. 1 Sutherland, Statutory Construction, 442 § 1937, 3rd ed. 1943. See *North Bend Stage Line v. Dept. Public Works*, 170 Wash. 217, 16 P. (2d) 206, where the state high court said at page 220:

> "* * * These sections, as unamended, provide for review of orders of the department in the superior court substantially as, by these amendments, they provide for such review in this court. * * *"

And at page 228 after holding the grant of direct appeal from the department to the state supreme court unconstitutional, the court said that the amended statutes "* * * remain unsuperseded and unrepealed by chapter 119, Laws of 1931, p. 363 * * *" citing *Corwin Investment Co. v. White*, 166 Wash. 195, 6 P. (2d) 607.

Indeed, in the previous oath case of *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10, the Employees admitted as much when on page 85 of their brief to the state high court they unequivocally stated that, "To declare the entire 1955 Act unconstitutional is to leave the 1951 Act totally effective and to eliminate the problems of interpretation."

This, it might be added, would include Section 11, the basic provision making subversive persons ineligible for state and local employment.

Viewed in this light, the Employees' references to the 1951 Act and to the portion of the oath derived from the 1951 Act seem indeed wide of the mark.

## PART IV

## THERE IS NO ACTUAL CONTROVERSY

### THE DISCLAIMER OATH

The two prior decisions by the Washington Supreme Court in no way compensate for the uncertainties created by the premature nature of this case.

Employees repeatedly refer to the two decisions, *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10; *Nostrand v. Little*, 58 Wn. (2d) 111, 361 P. (2d) 551, as if they cleared away any doubt regarding the 1955 Act, thereby making this case ripe for decision. But, in fact, these decisions are not all-purpose interpretations capable of resolving the kaleidoscopic legal questions which might arise under the complicated, twice amended 1951 statute. They answer some questions but they raise many more. The decisions illustrate the shortcomings of the declaratory judgment procedure; these occur, through no fault of the court, where broad, sweeping judgments are asked for by counsel even though a substantial bedrock factual basis for such broad judgments is lacking. The result, of course, is that it is sometimes difficult to distinguish the holding of the case from *dicta*. For example, in the two *Nostrand* cases, the court had before it only two plaintiffs, both full professors with tenure. The admissions of fact were brief, almost cryptic. The findings of the state trial court recited that through the professors' "employment contracts and

pursuant to statute and the rules and regulations of the University, plaintiffs have *certain* tenure rights. * * *" (Emphasis supplied) *Nostrand v. Little*, 58 Wn. (2d) 111, 117, 361 P. (2d) 551. After two hearings before the Washington Supreme Court and one before this Court one still knows little more than that the professors "* * * are entitled to a hearing before the tenure committee conducted in the manner prescribed in the applicable rules and regulations * * *" 58 Wn. (2d) at p. 132. One still does not know the scope of Washington Supreme Court's review. One does not know, whether, under the 1951 and 1955 statutes the Washington Supreme Court would reverse as contrary to law a decision on the part of the hearing tribunal and affirmed by the Board of Regents allowing a professor to retain his employment even though he refused to sign the disclaimer oath for reasons of conscience. One knows even less about the result of a refusal to sign on the part of those employees, if any there be, who have neither academic tenure, civil service tenure, nor contract rights as to tenure. One does not know the extent to which the non-academic tenure system and the Administrative Procedures Act would afford hearings to those employees without academic tenure. That the Washington court appreciated the difficulties created, is obvious from the court's statement that even in a declaratory judgment proceeding it is reluctant to rule on a hypothetical situation. 58 Wn. (2d) at p. 119. And, foreseeing how its opinion would

be used, the court expressly stated: "We, of course, limit our consideration of the problem to the facts before us. Even in a declaratory judgment action, there must be a justiciable controversy." 58 Wn. at p. 121. Nor does the court leave for conjecture the question of what the facts are:

> "The material facts shown by the record in the present case as to this hearing issue are that these two professors (who have never refused to take the oath) are presently employed under contract as full professors by the University of Washington, which is operated by the regents. Through their employment contracts, and pursuant to statute and the rules and regulations of the university, they have certain tenure rights. [Footnote omitted] The regents have demanded that the professors sign and swear to an oath (a copy of which is attached to their complaint), and have further stated that, unless the professors complied with such demand, their employment contracts with the university will be terminated by the regents." 58 Wn. (2d) at p. 123.

The uncertainties surrounding this case seem much more numerous than those pointed out by Mr. Justice Frankfurter (dissenting) in *Adler v. Board of Education*, 342 U. S. 485, 497:

> "We are asked to pass on a scheme to counteract what are currently called 'subversive' influences in the public school system of New York. The scheme is formulated partly in statutes and partly in administrative regulations, but all of it is still an unfinished blueprint. We are asked to adjudicate claims against its constitutionality before the scheme has been put into operation, before the limits that imposes upon free inquiry and association,

> the scope of scrutiny that it sanctions, and the procedural safeguards that will be found to be implied for its enforcement have been authoritatively defined. I think we should adhere to the teaching of this Court's history to avoid constitutional adjudications on merely abstract or speculative issues and to base them on the concreteness afforded by an actual, present, defined controversy, appropriate for judicial judgment, between adversaries immediately affected by it. * * *".

This case differs factually from *Adler* in that in *Adler* no oath form was proffered to the teachers. Hence, there was no problem of lack of a "refusal", a problem which exists in the present case. A delay by the Court in *Adler* would not necessarily have caused that case to become more ripe for decision. Whereas, in the present case, an action brought after an actual refusal would settle many questions.

It is true that the statutes in the present case are in effect; but it is also true that no controversy has arisen from an employee's dismissal. Indeed, there is no showing that any employee has ever been dismissed under it. Regents submit, therefore, that this Court should see the Employees' assertions that the definitional sections "have twice been passed upon" (App. Br. p. 34), that the question of the breadth of the definitions had been discussed (App. Br. p. 35) and especially that the amended statute "has been authoritatively construed," (App. Br. p. 35) in this light. The same is true of the Employees' reference to the state supreme court's "expressly stated policy" with regard to the right to a hearing. (App. Br. p. 169)

## THE 1931 OATH

The 1931 oath of allegiance statute, chapter 103, Laws of 1931 (RCW 28.70.150 et seq.) requires the professors and other teaching employees at Washington's state universities to subscribe to an oath which reads as follows:

> "I, the undersigned, do solemnly swear (or affirm):
>
> "(1) That I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, for reverence for law and order, and undivided allegiance to the government of the United States. * * *"

This statute has never been construed by the Washington Supreme Court. Regents adhere to the position urged below, adopted by the three-judge district court, a position constantly reiterated by this Court, namely: "Wise judicial administration counsels that decision of the federal question be deferred until the potentially controlling state law issue is authoritatively put to rest." *United Gas Pipeline Company v. Ideal Cement Comany*, 369 U. S. 134 (1962) and cases cited therein. Regents know of no case where this Court has struck down a state oath requirement without the state high court having had an opportunity to pass on it. Employees point out that *Shelton v. Tucker*, 364 U. S. 479, was an appeal from a three-judge district court (App. Br. p. 138) but a companion case, *Carr v. Young* (same citation), which had been appealed from the state high court was decided at the same time.

> the scope of scrutiny that it sanctions, and the procedural safeguards that will be found to be implied for its enforcement have been authoritatively defined. I think we should adhere to the teaching of this Court's history to avoid constitutional adjudications on merely abstract or speculative issues and to base them on the concreteness afforded by an actual, present, defined controversy, appropriate for judicial judgment, between adversaries immediately affected by it. * * *"

This case differs factually from *Adler* in that in *Adler* no oath form was proffered to the teachers. Hence, there was no problem of lack of a "refusal", a problem which exists in the present case. A delay by the Court in *Adler* would not necessarily have caused that case to become more ripe for decision. Whereas, in the present case, an action brought after an actual refusal would settle many questions.

It is true that the statutes in the present case are in effect; but it is also true that no controversy has arisen from an employee's dismissal. Indeed, there is no showing that any employee has ever been dismissed under it. Regents submit, therefore, that this Court should see the Employees' assertions that the definitional sections "have twice been passed upon" (App. Br. p. 34), that the question of the breadth of the definitions had been discussed (App. Br. p. 35) and especially that the amended statute "has been authoritatively construed," (App. Br. p. 35) in this light. The same is true of the Employees' reference to the state supreme court's "expressly stated policy" with regard to the right to a hearing. (App. Br. p. 169)

## THE 1931 OATH

The 1931 oath of allegiance statute, chapter 103, Laws of 1931 (RCW 28.70.150 et seq.) requires the professors and other teaching employees at Washington's state universities to subscribe to an oath which reads as follows:

> "I, the undersigned, do solemnly swear (or affirm):
>
> "(1) That I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, for reverence for law and order, and undivided allegiance to the government of the United States. * * *"

This statute has never been construed by the Washington Supreme Court. Regents adhere to the position urged below, adopted by the three-judge district court, a position constantly reiterated by this Court, namely: "Wise judicial administration counsels that decision of the federal question be deferred until the potentially controlling state law issue is authoritatively put to rest." *United Gas Pipeline Company v. Ideal Cement Comany*, 369 U. S. 134 (1962) and cases cited therein. Regents know of no case where this Court has struck down a state oath requirement without the state high court having had an opportunity to pass on it. Employees point out that *Shelton v. Tucker*, 364 U. S. 479, was an appeal from a three-judge district court (App. Br. p. 138) but a companion case, *Carr v. Young* (same citation), which had been appealed from the state high court was decided at the same time.

## PART V

## THE 1955 ACT AND THE 1931 ACT DO NOT VIOLATE THE FIRST AMENDMENT

### THE CASE LAW IS OVERWHELMING TO THE EFFECT THAT THE DISCLAIMER PROVISION OF THE 1955 ACT DOES NOT VIOLATE THE FIRST AMENDMENT.

This Court has decided no one case involving every issue and every fact presented here but the case law supporting Regents' position is so strong that to combat it Employees must make fine distinctions, distinctions without meaning, and ask the Court to disregard precedent.

Thus, Employees write off *Konisberg v. California*, 353 U. S. 252, and 366 U. S. 36, *In re Anastaplo*, 366 U. S. 82, and *Adler v. Bd. of Ed.*, 342 U. S. 485, as having been decided on the basis of "privilege." (App. Br. p. 57) It is true that, taken alone, certain language on p. 492 of *Adler* and p. 90 of *Anastaplo* seems to speak in terms of "right-privilege," but the cases certainly were not decided on this basis. This Court did not decide that a state could deny the right to practice law to members of a particular race or religion on the theory that state employment is a "privilege" which could be limited in any way, however arbitrary.

Nor can Employees successfully show that *N.A.A.C.P. v. Alabama*, 357 U. S. 449, or *Bates v. Little Rock*, 361 U. S. 516, corrodes *Adler v. Bd. of Ed.*, 342 U. S. 485; for underlying the *N.A.A.C.P.*

decision, where this Court held that a state may not compel the disclosure of N.A.A.C.P. membership lists, is the premise that the *nature* of the organization is decisive. The Court was careful to distinguish *Bryant v. Zimmerman*, 278 U. S. 63, upholding a New York statute requiring disclosure of Ku Klux Klan membership.

*Gerende v. Bd. of Supervisors*, 341 U. S. 56, involving, as it does, the summary imposition of a civil disability upon a refusal to take an oath is strong authority against the Employees position.

*Beilan v. Bd. of Education*, 357 U. S. 399, is certainly authority against Employees' position on the First Amendment argument, although it is not applicable to the procedural due process argument.

Most startling of all is Employees' attempt to distinguish *Garner v. Bd. of Public Works*, 341 U. S. 716. The fact is that the petitioners in *Garner* argued the First Amendment points and the Court took note of this on p. 720. But, before coming to grips with the bill of attainder point, it concluded on page 721 that, "This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers v. Mitchell*, 330 U. S. 75, and a State is not without power to do as much." Of course, *Mitchell* revolved largely around a First Amendment argument and the court discussed it extensively beginning on p. 95. It was not necessary for the court to repeat this entire dis-

cussion in *Garner*. Employees are driven to arguing that the Court erred in relying upon *Mitchell* and that the fact that the City of Los Angeles could impose such an oath on its civil servants does not mean that Washington could impose one on its state employees. (App. Br. p. 53)

The Employees have obscured the precedential value of *American Communications Association v. Douds*, 339 U. S. 382, by lumping the two oaths now before the Court together. The 1955 statute has no more "prescribed a state of mind". (App. Br. p. 122) than has the statute involved in *Douds*. In fact, if Employees are to satisfactorily distinguish *Douds* they must be prepared to argue that Congress can impose a civil disqualification to prevent political strikes but a state cannot do as much to combat subversion.

Hence, Employees' attempts to distinguish the foregoing cases are, we submit, unsuccessful.

May the state make the inquiry required by the 1955 Act without violating the public employee's First Amendment rights? The answer must be in the affirmative. *Adler v. Board of Education*, 342 U. S. 485, *Beilan v. Board of Education*, 357 U. S. 399, *Garner v. Board of Public Works*, 341 U. S. 716. Employees' reliance—see for example, page 64 of appellants' brief—upon *Sweezy v. New Hampshire*, 354 U. S. 234, is strange, since the petitioner, Sweezy, willingly answered questions which were roughly equivalent to the statements required by

the 1955 statute. Sweezy denied that he had ever been a member of the Communist Party or that he had ever been a part of any program designed to overthrow the Government of the United States by force or by violence. Thus, the question whether a person could be constitutionally compelled to answer such questions was not even before the Court. 354 U. S. at 239. Questions which Sweezy was directed to answer and which he declined to answer did not relate to his membership in the Communist Party but to his membership in other political organizations, his knowledge of the associations of *other* persons, statements he made in his classroom, and his belief in Communism. Some of the questions were as follows:

> "Was Nancy Sweezy then working with individuals who were then members of the Communist Party?
>
> "Was Charles Beebe active in forming the Progressive Citizens of America?
>
> "Did he work with your present wife—Did Charles Beebe work with your present wife in 1947?
>
> "Did it (a meeting at the home of Abraham Walenko in Weare during 1948) have anything to do with the Progressive Party?
>
> "What was the subject of your lecture?
>
> "Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?
>
> "Did you advocate Marxism at that time?
>
> "Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?
>
> "Do you believe in Communism?" 354 U. S. 243, 244.

Because of his refusal to answer these questions, Sweezy was convicted of contempt. His conviction was affirmed by the New Hampshire Supreme Court. On appeal to this Court, the conviction was reversed. This Court did not hold New Hampshire's Subversive Activities statute unconstitutional on its face. The opinions deal with the broad nature of the questions asked by the Attorney General. The questions, four justices held, were improper because it was not clear that they were authorized by the New Hampshire legislature. 354 U. S. at 253. No constitutional question was decided in the opinion signed by these four justices.

Two justices held that the questions infringed upon Sweezy's constitutionally protected and academic political freedoms, but they recognized the distinction between questions concerning *membership* in the Communist Party and questions concerning mere academic classroom references on Marxism, socialism or even communism.

> "Whatever, on the basis of massive proof and in the light of history, of which this Court may well take judicial notice, be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party." 354 U. S. at 266.

The questions were quite different from the statements required by the 1955 statute.

Nor does *Shelton v. Tucker*, 364 U. S. 479 cast a shadow on these cases; for, in that case, on page 485, footnote 4, this Court said, "The actual holdings in *Adler* and *Beilan*, involving the validity of teachers' discharges, are not relevant to the present case."

The Employees' only hope is for a reversal of these cases. But the trend is against them. *Barenblatt v. U. S.*, 360 U. S. 109, 125-134; *Wilkinson v. U. S.* 365 U. S. 399; *Braden v. U. S.*, 365 U. S. 431; *Communist Party v. S.A.C.B.*, 367 U. S. 1, 96-103. The lower court was correct in pointing out that, "It cannot be questioned that a state has power to safeguard the public service from disloyalty; and the right of the state to inquire of its employees concerning their loyalty has been recognized in a number of cases." (R. 242)

Regarding the form of the inquiry, the lower court held (R. 244) that there is no violation of First Amendment rights simply because a written form is used rather than an oral form, such as was used in *Beilan*. The key question is whether the written form is limited to the area of legitimate state concern. The lower court added, "In an institution as large as the University of Washington, to conduct personal interviews of all present and prospective employees concerning their loyalty would be administratively burdensome and might be subject to abuses. In lieu of such inquiry the university officials have elected to require a sworn statement, narrowly limited to the precise matters of legitimate state concern. So limited, the oath serves the same purpose as individual inquiry." (R. 244)

The First Amendment argument of whether the inquiry can be made should be treated separately from the Fourteenth Amendment argument of

whether dismissal can be carried out on the basis of the answer or lack of answer given.

THE 1931 ACT DOES NOT VIOLATE THE FIRST AMENDMENT.

It cannot be denied that *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, would place in doubt the constitutionality of the 1931 Act were the oath required by that act to be taken by students. Only teachers need take this oath, however.

The state has a legitimate interest in setting up qualifications for its public employees, though to do so incidentally affects free speech. In *Barnette*, as in *Speiser v. Randall*, 357 U. S. 513, the state attempted to set up a certain requirement affecting a broad segment of the public. The societal need for qualifications on the part of a particular group such as teachers or labor leaders is greater than the need with regard to the general public.

The efficacy of an oath such as the one required by the 1931 Act is another matter. But may not a legislator reasonably believe that a teacher who signs such an oath would be slightly more inclined to teach in such a manner as to inspire patriotism and loyalty than had he not signed the oath? The answer must be in the affirmative.

THE 1955 ACT IS NOT AN UNCONSTITUTIONAL PRIOR RESTRAINT.

Citing *Shelton v. Tucker*, 364 U. S. 479, as authority, Employees claim that the 1955 Act is

void as an unconstitutional prior restraint on the grounds that the legitimate state interest could be more narrowly achieved by less drastic means.

Employees rely on *Speiser v. Randall*, 357 U. S. 513. (App. Br. p. 139) This reliance is misplaced for on page 517, footnote 3, this Court stated:

> "Appellants also argue that these provisions are invalid * * * as invading liberty of speech * * * Our disposition of the cases makes consideration of these questions unnecessary."

A prior restraint is not, *ipso facto*, unconstitutional. *Times Film Corp. v. Chicago*, 365 U. S. 43. But it is true that this Court will not allow a state to abridge certain liberties where no substantial state interest is involved by lumping such a measure with a measure combating subversion, a legitimate state interest. Thus a claim that an Arkansas statute is justified because of the right of a state to investigate the competence and fitness of those whom it hires to teach in its schools cannot be used as a cloak to cover the attempt of a state to discover whether a teacher is a member of the N.A.A.C.P. *Shelton v. Tucker*, 364 U. S. 479. Nor can one making inquiry pursuant to the investigative powers of a legislature, and again in the guise of combating subversion, force an answer as to belief, abstract advocacy of Marxism, and the like. *Sweezy v. New Hampshire*, 354 U. S. 234.

Employees claim that "the question is whether a fair method has been established," (App. Br. p.

140), and "this Court has held that the state must achieve its legitimate purpose by the method having the least impact on First Amendment rights?" (App. Br. p. 144). What is the authority for this claim? It can hardly be contended that *Shelton v. Tucker*, 364 U. S. 479, is authority for the proposition that a statute is unconstituitonal if the human mind can devise any other means of carrying out the state's legitimate purpose with less restriction of speech; this case is not nearly so extreme. To go to such extremes would be to place an impossible burden on the legislative bodies. Not one of the oaths upheld by this Court would be valid if this were the test, since reflection suggests changes which would bring them into sharper focus. Certainly the Employees paraphrase is a long way from the language used in *Shelton*: "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." (364 U. S. at p. 488)

It can be argued that the administrative program provided by Section 12, chapter 254, Laws of Washington 1951 allows the unscrupulous administrator more latitude with the consequent danger to constitutionally guaranteed liberties than does the oath requirement. Yet, Employees claim that this procedure is "less drastic than the oaths." (App. Br. p. 140) But even assuming that the alternative procedures are less drastic, the question is not which method is most preferable, the question is whether

the alternative procedures available create a constitutional barrier to the oath requirement. A legislator might well feel that a statement of Harold W. Dodds, President Emeritus of Princeton University is as applicable to loyalty as it is to scholarship standards:

> "Many presidents feel that the case for academic freedom would be stronger if the academic profession were to match its protective activities by a more positive role in disciplining colleagues who violate professional standards of teaching and scholarship or who are guilty of incompetence, irresponsibility, or downright neglect of duty. * * *" 28 Law and Contemporary Problems 605.

How has this Court applied the "over-broad" test when dealing with past cases?

In *American Communications Assn. v. Douds*, 339 U. S. 382, this Court upheld a system which is a far cry from the "selective" administrative programs referred to by the Employees. The oath provision affected union officials of almost all labor organizations of any appreciable size. It did not affect only those sectors with a history of political strikes. The oath requirement applied to "each officer." (81 Stat. 146, ch. 120, 29 U.S.C.A. 159(8)). The same type of blanket requirement characterized Los Angeles City Ordinance No. 94004, which was upheld by this Court in *Garner v. Board of Public Works*, 341 U. S. 716.

If these oath requirements are valid, no distinction can be found to justify Employees' assertion that an administrative program is the constitutional maximum permitted the Washington Legislature.

State administrative programs in general have not been enforced. (Brown, R. S., Jr., *Loyalty and Security*, p. 99) Nothing in the record indicates that Washington is an exception.

The Washington legislature, then, is not bound to rely upon only a "hit or miss" administrative system. The legislature could legally enact a blanket minimum requirement in the form of the disclaimer oath. (The Court is referred to Part VI relating to the vagueness doctrine for a discussion of whether the 1955 Act includes certain lawful activities and associations of Employees within its ambit. This discussion is applicable to the prior restraint question as well.)

THE OATHS DO NOT VIOLATE THE FIRST AMENDMENT GUARANTEES ON RELIGION.

The Washington oaths are not "prayers," nor do they constitute by any stretch of the imagination a "purely religious function." But this does not satisfy Employees. They claim:

> "Should this Court choose to follow this distinction, characterizing the 1931 and 1955 oaths as 'secular,' then we submit the two oath statutes are unconstitutional as to all appellants, and others similarly situated, in that they prohibit their free exercise of religion and consciences and force them to abridge their consciences, and that this is particularly true of appellants Matchett and Orians." (App. Br. p. 163)

To link the 1931 Oath of Allegiance statute with a denial of religious freedom is also an untenable

argument. The Supreme Court in *Engel v. Vitale*, 370 U. S. 421, carefully distinguished expressions of patriotism from official prayers.

> "There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which includes the Composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." (370 U. S. at page 435, footnote 21).

*Re Summers*, 325 U. S. 561, supports the validity of the 1931 Act. There, where a bar applicant had refused to take an oath to support the state constitution, this Court held it was not unconstitutional for the state to deny him admission to the bar. This was true even though the state constitution had a provision requiring service in the militia in time of war. The applicant had refused because of his unwillingness based on personal scruples to serve in the state militia in time of war.

If a state can refuse to allow a person to practice law on this ground, surely a state can demand of a teacher, as a condition of employment, the 1931 oath.

THE INTEREST TO BE PROTECTED IS SUBSTANTIAL.

Perhaps the most crucial part of Employees' First Amendment argument concerns the lack of a societal interest to justify the 1955 Act. The Employees must show that the societal interest is not substantial, as in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624. Employees must somehow get around the two reports of the Joint Fact-Finding Committee on Un-American Activities. This they have attempted to do by claiming that parts of the report are false (App. Br. p. 119), and by claiming that the lapse of six years from the report's filing to the 1955 Act is too long for the findings to support the 1955 Act. (App. Br. p. 120)

The *Second Report Un-American Activities in Washington, 1948*, deals, in the main, with the University of Washington. It would serve no purpose to belabor this point. It is a part of the record. When one considers that the reports comprise several hundred pages, it is surprising that Employees can question only a small percentage of its contents. The bulk of the reports stands undisputed.

There is no blanket requirement that every piece of legislation dealing with subversion be preceded by legislative findings, but it cannot be doubted that valid findings often strengthen the legislation when its constitutionality is called into question. After reciting certain legislative findings on the nature of the communist movement too lengthy to be reported here, this Court in *Communist Party v. S.A.C.B.*, 367 U. S. 1, 94, said:

"It is not for the courts to re-examine the validity of these legislative findings, and reject them. See *Harisiades v. Shaughnessy*, 342 US 580. They are the product of extensive investigation by committees of Congress over more than a decade and a half. Cf. *Nebbia v. New York*, 291 US 502. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan v. Press*, 347 US 522; *American Communications Asso. v. Douds*, 339 US 382. * * * "

Nor will this Court give less weight to findings of a state legislature which come to the Court "encased in the armor wrought by prior legislative deliberation." *Bridges v. Calif.*, 314 U. S. 252, 261.

Conceding, arguendo, that conditions could change to such a degree as to vitiate a legislative finding, the dangers resulting from the communist movement referred to in the Joint Committee's report (House Journal 1949, p. 1095 *et seq.*) have not disappeared. This court has, in effect, recognized this fact by deciding the *Communist Party* case, *supra*, on June 5, 1961, although it was based on legislation dating from 1950 to 1954. Subversive activities legislation was passed in 1947, 1949, 1951, 1953 and 1955. Argument that any of this legislation is invalid because additional legislative findings were not made after 1949 seems strained, to say the least.

The Reports of the Joint Fact-Finding Committee reinforce what this Court should decide in any event: There is an interest of the state in self-preservation which justifies the action of the legislature. After this Court's decision in *Garner, Adler*

and *Douds*, all *supra*, it is apparent that Employees do not have a valid argument regarding the lack of societal interest to be protected; their argument, if any they have, must be that the means used to protect this interest are unconstitutional.

Once it is decided that the state has a legitimate interest in not keeping in its employ subversive persons, as they are defined in the Subversive Activities Act, as amended, there can be no question of nexus; for however much one may argue that hardened subversives would not hesitate to sign such an oath thus leaving the man of conscience as the victim, the fact is a legislator would be perfectly justified in believing that the disclaimer oath would have a substantial deterrent effect since the criminal sanction might give the subversive employee or applicant pause. "There is some support for this view," writes Professor Ralph S. Brown, "in the history of New York investigations into the loyalty of public school teachers. Some of the witnesses, who in the early 1940's denied communist affiliation before the Rapp-Coudert committee, ten years later found it advisable to plead the Fifth Amendment in response to similar questions from the Senate Internal Security Subcommittee. One proffered explanation for this change in tactics is the availability of sufficient government witnesses in the current investigation to make a criminal prosecution for false swearing stick." Brown, R. S., *Loyalty and Security*, p. 94.

Regents would not even make reference to the discussion (App. Br. p. 142) of the policy of the

University of Washington regarding speakers on the campus—it being not only outside the record but irrelevant as well—were it not for the fact that it is incorrect; the policy referred to was terminated by resolution on January 24, 1964, by the Board of Regents, a date subsequent to the publication of Appellants' Brief.

## PART VI

## THE 1955 ACT AND THE 1931 ACT DO NOT VIOLATE THE FOURTEENTH AMENDMENT

### THE EMPLOYEES WHO REFUSE TO SIGN THE DISCLAIMER OATH ARE PROBABLY ENTITLED TO A HEARING.

Employees' argument that the 1955 Act violates procedural due process in that it does not allow a hearing seems to have three bases: The Washington Supreme Court allows no hearing to non-tenured personnel and a sham hearing to tenured personnel; no statute allows such a hearing, and the officials charged with administering the acts will allow no hearing, save the sham hearing resulting from the Washington Supreme Court's decision.

It is true that the statutes, court decisions, and administrative actions are the key factors, but Regents submit that they lead to the opposite conclusion.

The Employees, it will be noted, fall into three different categories: those with academic tenure; those with classified civil service tenure, and those with no tenure at all, save possible contract rights.

The Washington Supreme Court has squarely held that those with academic tenure are entitled to a hearing. This has driven Employees into the extreme position of claiming that the Washington Supreme Court sanctioned a sham hearing (App. Br. p. 172), a position which scarcely deserves argument.

With regard to the other two categories no such categoric answer can be given since the Washington high court has not spoken.

First, what is the rule regarding persons with academic tenure? After *Nostrand v. Little*, *supra*, was remanded by this Court to the Washington high court for determination of whether the professors would be accorded a hearing, counsel for the professors argued that under law no hearing could be accorded to the professors. The state attorney argued to the contrary. In its decision the court held:

> "We are of the opinion that the provision in the subversive activies act to the effect that refusal to take the oath 'on any grounds' shall be cause for 'immediate termination of employment,' should not be interpreted in the case before us as meaning that a full professor having tenure rights under his contract of employment is deprived of the right to a hearing as provided in the rules and regulations of the university. In other words, if the professors should refuse to sign the affidavit (which they have not yet refused to do), they, in our opinion, will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the university's rules and regulations, set forth in the appendix to this opinion." 58 Wn. (2d) at p. 131.

But what of persons without academic tenure? Employees' argue that under *Nostrand v. Little*, *supra*, neither the Civil Service Act nor the Administrative Procedures Act could be used to accord Employees a hearing; but in fact, the question of whether persons without academic tenure could take advantage of either act was not before the court. On page 121, the Washington high court tried to preclude just such claims by stating: "We, of course, limit our consideration of the problem to the facts before us."

The real thrust of *Nostrand v. Little*, *supra*, is the fact that the court there held that a professor with tenure could not be discharged under the 1955 Act alone and without reference to any other statutes. If the court construed the 1955 Act with RCW 28.77.120 and 28.77.130 there is every likelihood that it would consider other statutes if the last quoted statutes were not applicable this would be the case if a person were without tenure.

The two statutes are the Civil Service Act (chapter 1, Laws of the State of Washington 1961) and the Administrative Procedures Act (chapter 234, Laws of 1959). It should be noted that both acts became law some years after the 1955 amendatory act.

It is well to consider the Civil Service Act first, since it appears to apply to some of the non-academic employees who are among the appellants. (The record does not show that each non-academic em-

The Washington Supreme Court has squarely held that those with academic tenure are entitled to a hearing. This has driven Employees into the extreme position of claiming that the Washington Supreme Court sanctioned a sham hearing (App. Br. p. 172), a position which scarcely deserves argument.

With regard to the other two categories no such categoric answer can be given since the Washington high court has not spoken.

First, what is the rule regarding persons with academic tenure? After *Nostrand v. Little, supra*, was remanded by this Court to the Washington high court for determination of whether the professors would be accorded a hearing, counsel for the professors argued that under law no hearing could be accorded to the professors. The state attorney argued to the contrary. In its decision the court held:

> "We are of the opinion that the provision in the subversive activies act to the effect that refusal to take the oath 'on any grounds' shall be cause for 'immediate termination of employment,' should not be interpreted in the case before us as meaning that a full professor having tenure rights under his contract of employment is deprived of the right to a hearing as provided in the rules and regulations of the university. In other words, if the professors should refuse to sign the affidavit (which they have not yet refused to do), they, in our opinion, will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the university's rules and regulations, set forth in the appendix to this opinion." 58 Wn. (2d) at p. 131.

But what of persons without academic tenure? Employees' argue that under *Nostrand v. Little*, *supra*, neither the Civil Service Act nor the Administrative Procedures Act could be used to accord Employees a hearing; but in fact, the question of whether persons without academic tenure could take advantage of either act was not before the court. On page 121, the Washington high court tried to preclude just such claims by stating: "We, of course, limit our consideration of the problem to the facts before us."

The real thrust of *Nostrand v. Little*, *supra*, is the fact that the court there held that a professor with tenure could not be discharged under the 1955 Act alone and without reference to any other statutes. If the court construed the 1955 Act with RCW 28-.77.120 and 28.77.130 there is every likelihood that it would consider other statutes if the last quoted statutes were not applicable this would be the case if a person were without tenure..

The two statutes are the Civil Service Act (chapter 1, Laws of the State of Washington 1961) and the Administrative Procedures Act (chapter 234, Laws of 1959). It should be noted that both acts became law some years after the 1955 amendatory act.

It is well to consider the Civil Service Act first, since it appears to apply to some of the non-academic employees who are among the appellants. (The record does not show that each non-academic em-

ployee would come under the exceptions to civil service coverage listed in section 5.) Section 5 provides in part as follows:

> "At each institution of higher learning the governing body shall within thirty days after December 8, 1960 designate three of its members as a permanent personnel committee, compensated and reimbursed as provided in RCW 41.06.110, to enforce and perform for all its nonacademic personnel, except those in positions specifically exempted by the governing body on analogy to the exemptions of * * * "

The extract from the minutes of a meeting of the Board of Regents on December 16, 1960, shows that the following action was taken:

> "It was noted that the civil service initiative which was approved by the voters on November 8, 1960, became law on December 8, 1960, and has legal application to the University of Washington. Under this law the Board of Regents is required to appoint three of its members as a Personnel Committee to administer the provisions of the law on the campus. This Personnel Committee will serve as the University Civil Service Board.
>
> "Attention was also called to the fact that there are several items in the law which require action by the Board at this meeting, since such action must be taken before January 7, 1961.
>
> "These are:
>
> "That by January 7, 1961, the Board of Regents shall select three of its members to serve as a University Personnel Committee for terms of two, four and six years (appointments thereafter to be for six-year terms) to administer the provisions of the law.
>
> "That by January 7, 1961, the Board of Regents shall designate a full time nonacademic

employee to serve as Director of Personnel to direct and supervise the Personnel Department and to prepare for consideration by the University Personnel Committee proposed rules and regulations required by the law.

"Upon the recommendation of President Odegaard, the Board appointed Mr. Reginald Root to serve as Director of Personnel and named the following members of the Board of Regents to serve as the University Personnel Committee for terms of two, four and six years, respectively:

"Regent Robert J. Willis, Chairman (two years)

"Regent Harold S. Shefelman, Vice-Chairman (four years);

"Herbert S. Little (six years)."

The University Personnel Committee adopted a number of rules on October 27, 1961, including Rule XIV. This rule makes applicable to those under its jurisdiction the provisions of sections 18, 19, 20 and 21 of the Civil Service Act, which provide for a hearing procedure.

But what of those Employees who are covered by neither civil service tenure nor academic tenure? That the Employees are hard pressed to find a reason why a hearing would not be granted is evidenced by the manner in which the Employees have emphasized certain portions of the Regents' statement. (App. Br. p. 172.) A reading of the document simply indicates that the Regents intend to follow the law, it does not indicate that under the law no hearing would be accorded an employee. Likewise on page 173 of their brief, Employees have italicized the

words "on any grounds" found in the 1955 Act. The effect would have been very different if they had italicized the following three words, "*shall be cause* for immediate termination * * *" (Emphasis supplied.) There is, of course, a great difference between a matter being a cause for immediate termination and a matter which must result absolutely in immediate termination.

These Employees are probably entitled to a hearing under the Administrative Procedures Act. It is not a certainty because it has never been passed upon by the Washington Supreme Court. This Court will, of course, assume that a statute will be interpreted by the highest state court in such a way as to avoid raising constitutional problems where such interpretation is possible. *Fox v. Washington*, 236 U. S. 273.

Until this is done it is the intention of the state to allow a hearing on the assumption that it is better to err by allowing too much due process rather than too little. Nor is there anything novel about such an approach. In regard to the third factor, state agencies have, upon the advice of the state attorney general, on numerous occasions accorded a hearing to a party on the basis of the Administrative Procedures Act where no specific hearing is provided by statute. An example of this is *In re Christensen*, No. 84575 Thurston County Superior Court, State of Washington. In this case the director of licenses granted a hearing to an applicant who had been refused a broker's license even though such a hearing was not

specifically provided by the Real Estate Licensing Act (chapter 18.85 RCW).

There are undoubtedly times when a hearing would seem appropriate. For example, if an individual attempted to resign from a subversive organization by communicating with one of the members, it is possible this individual would not be sure whether his resignation was effective, since many of such organizations not having membership cards and lists. If such an individual were to ask for a hearing so that he might explain the steps he had taken to attempt to resign it seems probable that the hearing would be allowed under Washington law and administrative practice.

To prevail on this point, Regents need not show that a hearing is definitely required by the statute. They need only show that such a possibility cannot be ruled out. *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U. S. 134, 136. The Employees should not be permitted to profit from the uncertainties arising from this action because of its premature nature.

Since a hearing is probably accorded under Washington law, it is probably not necessary for us to rely upon cases upholding the imposition of a civil disqualification with no right to a hearing, such as *Board of Governors of Federal Reserve System v. Agnew*, 329 U. S. 441, *Gerende v. Board of Supervisor of Elections*, 341 U. S. 56, *United Public Workers v. Mitchell*, 330 U. S. 75, *American Com-*

*munications Association v. Douds*, 339 U. S. 382, and *Cafeteria Workers v. McElroy*, 367 U. S. 886.

How might this act provide such a hearing? Section 9 provides in part: "In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. * * *" Section 1 defines a contested case as "* * * a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or *constitutional right* to be determnied after an agency hearing." (Emphasis supplied.)

*Gnecchi v. State of Washington*, 58 Wn. (2d) 467, 364 P. (2d) 225, a case decided *en banc* a few months after *Nostrand v. Little*, *supra*, went beyond what was strictly necessary to reach its holding to indicate that under the Administrative Procedures Act, such an employee would be provided a hearing if the lack of a hearing would deprive him of a constitutional right. The court seemed to be following the lead of this Court. (See *Wong Yang Sung v. McGrath*, 339 U. S. 33.)

One final uncertainty with reference to the disclaimer oath should be mentioned. The record is silent as to the provisions of any employment contract. It is impossible to determine, therefore, whether any of the Employees would acquire any hearing rights in this way.

WHETHER AN EMPLOYEE WHO REFUSES TO SIGN THE 1931 OATH WOULD BE ENTITLED TO A HEARING IS A MATTER FOR CONJECTURE.

It cannot be denied that a literal reading of the 1931 statute indicates that there is less chance that a person refusing to sign the oath it requires would be afforded a hearing than would be the case with the disclaimer oath; yet if the Washington Supreme Court were to read the 1931 statute *in pari materia* with some other statute, such as the Civil Service Act or the Administrative Procedures Act the result would hardly be more surprising than that court's holding in *Nostrand v. Little*, 58 Wn. (2d) 111, 361 P. (2d) 551, on the hearing issue. This leads again to the question of whether the case is ripe for decision, whether there is an actual controversy. (The Court is referred to Part IV for a discussion of this question.)

THE 1955 ACT DOES NOT VIOLATE CONSTITUTIONAL GUARANTEES AS TO VAGUENESS.

In dealing with this question (App. Br. pp. 186-192), Employees' difficulty comes not from stating the general rules but from attempting to apply the general rules to this particular case.

The oath required, and the statutes on which it is based, are not unconstitutionally vague; the terms used therein are susceptible of objective measurement.

Employees have quoted no cases which militate against the validity of this oath. *Cramp v. Florida*,

368 U. S. 278, relied upon by Employees on page 192 of their brief is not applicable, for the oath involved in *Cramp* can hardly be compared with the oath in the present case. The former oath provides in part, "* * * that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party * * *". The Court, itself, seems to have distinguished this case from *Cramp* when, on page 286 it pointed out that:

> "The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or Federal Government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms *susceptible of objective measurement*." (Emphasis supplied.)

This Court denied certiorari in a case involving alleged vagueness of the Obey Act which, as pointed out earlier, is very similar to the 1951 Act. *Shub v. Simpson*, 196 Md. 177, 76 A. (2d) 322, 340 U. S. 861. Also significant, is the fact that this Court affirmed *Gerende v. Bd. of Supervisors*, 341 U. S. 56, a decision based upon the *Shub* interpretation. But even more significant is the fact that this Court has affirmed prison sentences—a far cry from this declaratory judgment procedure—stemming from statutes resembling the Subversive Activities Act. One example is the Smith Act, 54 Stat. 671, 18 U. S. C. 2285 (Supp.), as amended. The statute reads in part:

> "Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, neces-

> sity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence. * * *
>
> "Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both. * * *"

*Dennis v. United States*, 341 U. S. 494, sustained this statute in the face of an allegation, *inter alia*, that it was unconstitutionally vague. In rejecting the contention, the Court said:

> "We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness * * *
>
> "* * * We think [the statute] well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand."

Regents submit that if a criminal statute can make it unlawful to "advocate * * * abet * * * advise * * * or teach * * * the violent overthrow * * * of the government of the United States or the government of any State * * *" without doing violence to the principle of unconstitutional statutory vagueness, a state is free to require an oath in approximately those terms without doing violence to that principle.

While to set forth other statutes would make this brief unduly prolix, the Court is referred to the statutes involved in *Gitlow v. N. Y.*, 268 U. S. 652, and *Whitney v. Calif.*, 274 U. S. 357. This Court refused to strike down oaths and the statutes upon which they are based, which are much more questionable than those in this case. (*Garner v. Bd. of Public Works*, 341 U. S. 716; *American Communications Association v. Douds*, 339 U. S. 382.)

It is not necessary to set forth the lower court's discussion relating to vagueness. (See, R. 245.) The fact that a unanimous three-judge court found that the meaning was not uncertain or vague—in any event not to the extent that the statute must be held unconstitutional—is itself persuasive that the statutes are not void on their face. The lower court pointed out that a person taking the oath, " * * * is not required to speculate concerning the applicability of every conceivable or rare meaning of the words employed." He need only apply them to his own case. (R. 246.)

Although the subject of subversion is susceptible to overdramatization, it should be pointed out that based upon the history of other nations, a statute would be of little use which included within its ambit only those who participate in the *putsch* itself. It must also include those who provide assistance by supplying weapons and the like. Second, an insurrection is not the work of one man and; as a result a statute, to be of any use, cannot include only those who *alone* carried out the attempted *coup d'etat*.

It would avail Employees little to attack the word "revolution," found in the 1951 statute as being ambiguous by claiming that "revolution" could involve a peaceful and constitutional change; this is so because even if this word were found unconstitutional, only the word would be stricken under the state high court's ruling in *Household Finance Corp. v. State*, 40 Wn. (2d) 451, 244 P. (2d) 260. The companion words "force or violence" would remain.

The cases cited by Employees illustrate the general rule regarding vagueness. Employees have cited no cases—indeed, there are no such cases—to show that the 1955 statute is vague. Thus the parade of "horribles" they cite of, "any gang", *Lanzetta v. N. J.*, 306 U. S. 451, "principally made up of criminal news, police reports or accounts of criminal deeds or pictures or stories of deeds of bloodshed, lust or crime," *Winters v. N. Y.*, 333 U. S. 507, "displays a red flag * * * or device of any color * * * as a sign * * * of opposition to organized government. * * * ", *Stromberg v. California*, 283 U. S. 359, and "lend my aid, support, advice, counsel or influence to the Communist Party," *Cramp v. Florida*, 368 U. S. 278, are distinguishable from the 1955 statute.

Once it is determined that the statutes are not void on their face, *Fox v. Washington*, 236 U. S. 273, is applicable, holding that the Court will assume that a statute will be interpreted by the highest state court in such a way as to avoid raising difficult constitutional problems where any such interpretation is pos-

sible. See also *Shuttlesworth v. Birmingham Bd. of Ed.*, 358 U. S. 101. Our state high court would of course, be guided by Section 19 of the 1951 Act which provides in part that, "Nothing in this act shall be construed * * * to limit or infringe upon freedom of the press or freedom of speech or assembly within the meaning and the manner as guaranteed by the Constitution of the United States * * *"

In order to judge whether either oath is a prior restraint in violation of the First Amendment or void for vagueness under the Fourteenth Amendment it is necessary to match the wording of the oaths against the activities and associations of the Employees. The activities and associations of all of the Employees are not set forth in the record; it is, however, possible to assume that in the series of statements of several of the Employees (R. 188-218) the Employees have set forth those associations and activities, in their opinion, most likely to be considered subversive.

Initially it must be conceded that the Employees' statements to the effect that they do not feel they can sign either oath for reasons of conscience cannot be rebutted. The same is true of their belief that the oaths are illegal under the Federal constitution and their belief that signing the oaths would subject them to perjury. But the question of whether the fear of perjury is well-founded is quite another matter. It is not necessary to discuss the affidavits one by one since the affidavits resemble

each other in that the fear of perjury rests on a few types of associations and activities. These activities are working and exchanging information with scholars of countries having a Communist government, editing or contributing to an international scholarly publication and attending academic conferences held under the auspices of a Communist government. The final activity which some of the Employees felt would subject them to perjury was discussing controversial subjects such as the non-recognition of Communist China. (R. 204.)

The organizations listed are nearly all international academic organizations.

It is clear that once the opinions of the Employees as to the legality of the oath and the wisdom of the oath are pared from their affidavits the remaining activities and associations mentioned could by no stretch of imagination result in a conviction for perjury. (A hearing procedure is available, but Regents submit that there would be no risk of perjury to Employees even if there were no hearing procedure to resolve doubts in the borderline area.)

The fact is that the Employees would be remiss in their duties in most cases if they did not belong to these international academic organizations and if they did not write for international publications, or if they did not exchange information of an academic nature with scholars in the same field wherever such scholars may be found, or if they failed to discuss controversial political subjects, statutes and episodes

in history in which, in the opinion of the teacher, the United States acted wrongly. There is no showing that any of the organizations to which the Employees belong "engages in or advocates, abets, advises or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of government. * * *" (RCW 9.81.010(3))

It is true that two individuals claim they cannot sign the oath of allegiance because it would conflict with their foreign citizenship. (R. 200, 215) However, in Part VI of this brief Regents have shown that non-citizens have not been requested to sign the oath of allegiance in its statutory form, that they are not at present required to do so and that there is no indication that they will in the future be required to do so.

The point is made that some of the information gained by a Communist government has possible military application. (R. 57) Admittedly, if the test were, does the exchange of information constitute, aid, support, counsel or advice to the Communists, as was true in *Cramp v. Florida*, 368 U. S. 278, the constitutionality of this statute would be more difficult to defend. This, however, is not the test, since the 1955 Act sets forth much more specific requirements.

Nor can it be said that one who engages in the activities set forth by the Employees "aids in the

commission or advocates, abets, advises or teaches by any means, any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration" of our constitutional form of government by "revolution, force, or violence." (RCW 9.81.010(5)) Where the Florida statute speaks of "lending aid, support, advice, counsel or influence," the Washington statute speaks in terms of aiding the commission of specific acts of violence. Thus it is clear that the actual threat of a perjury conviction is very different from the Employees' fear of such conviction.

"'Perjury requires a higher measure of proof than any other crime known to the law, treason alone excepted.'" (*State v. Wallis*, 50 Wn. (2d) 350, 311. P. (2d) 659 (1957).) After starting its opinion with the above quote the Washington Supreme Court proceeded to point out, quoting an earlier case, that to convict one of perjury:

> "'There must be the direct testimony of at least one credible witness, and that testimony to be sufficient must be positive and directly contradictory of the defendant's oath; in addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted.'" (50 Wn. (2d) at p. 353)

This statement of the Washington Supreme Court as to the great quantum of proof necessary to convict one of perjury underscores the lack of a reasonable basis for the Employees' expressed fear.

THE 1931 ACT DOES NOT VIOLATE CONSTITUTIONAL GUARANTEES AS TO VAGUENESS.

Employees assert, as if it were a fact, that "any affiant who subscribes falsely to the statutory oath of undivided allegiance, in addition to loss of employment, subjects himself to possible perjury prosecution, punishable by imprisonment in the state penitentiary for not more than fifteen years (RCW 9.72.010, et seq.)," (App. Br. p. 29) The statute cited is the state's perjury statute.

But is is *not* a crime to violate the oath. The oath provides, "I . * * * will support . * * . * and will * * * promote. * * * " It is thus promissory in form. It is not a disclaimer oath. One promises to do certain things in the future. Can a man go to jail for failing to carry out his promises? No, according to any legal authority Regents have found. The rule is found in 70 C. J. S. 462, Sec. 6, Perjury: "A promissory statement ordinarily cannot constitute perjury or false swearing * * * ordinarily it is held that an official oath cannot be the subject of perjury in so far as such oath involves statements purely promissory." If the legislature had provided a specific penalty for breach of this promissory oath the rule would not apply. The rule is set forth in *State v. McCarthy*, 38 N. W. (2d) 679, 686 (255 Wis. 234):

"The official oath to which the defendant subscribed does not affirm the present existence of a fact, and relates to the future conduct of the affiant. The affiant solemnly promises that *he will* support the constitution of the United States and the constitution of the State of Wisconsin, and that *he will* administer justice without respect to persons, and that *he will* faithfully and impartially discharge the duties of his office. Such an oath is called a promissory oath. * * *

"Violation of an oath of office does not constitute perjury as that offense is defined in the law. * * *

"In 1 Hawkins, P. C. 431, first published in 1716, a standard text on English criminal law, the rule is stated thus:

" 'Also from what has been said it appears that the notion of perjury is confined to such public oaths only as affirm or deny some matter of fact contrary to the knowledge of the party; and therefore, it doth not extend to any promissory oaths whatsoever. * * * '"

The fact that it is no crime for a person to violate this oath is the death of Employees' argument that the 1931 statute violates the due process clause because of vagueness. Employees have not produced one case where this Court struck down a statute due to vagueness involving a sanction or lack of sanction comparable to the present case. On the contrary, the cases dealing with vagueness involve a criminal sanction or sanction such as deportation even more drastic than many, if not most, criminal sanctions. (*Jordan v. De George*, 341 U. S. 223. See the annotation, "Indefiniteness of language as affecting validity of criminal legislation—Supreme Court cases," 98 L. Ed. 374.)

THE 1955 ACT AND THE 1931 ACT DO NOT INVOLVE AN UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF.

Citing *Speiser v. Randall*, 357 U. S. 513, as authority, Employees claim that the 1955 Act involves a denial of procedural due process in that it shifts the burden of proof to the public employee. (App. Br. pp. 182-186) While the Employees' argument might have merit were the oath demanded of the public in general, it has no merit where, as here, the oath requirement is directed to a specific group, to wit, public employees. A much more substantial societal interest exists where a state inquires into the loyalty and fitness of its public employees than where a state inquires into the loyalty and fitness of veterans, or members of a particular race or religion.

The petitioner in *Speiser* prevailed in this Court because of an unconstitutional allocation of the burden of proof in a tax exemption proceeding. This Court went to great lengths to distinguish certain disclaimer oath cases involving a specified group where the oath requirement is backed up by a substantial state interest. Specifically, this Court on page 527, with reference to *Garner v. Bd. of Pub. Wks.*, 341 U. S. 716, *Gerende v. Board of Supervisors*, 341 U. S. 56, and *American Communications Association v. Douds*, 339 U. S. 382, said, "In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of gov-

ernmental concern." On page 528 the Court said, "The State argues that veterans as a class occupy a position of special trust and influence in the community, and therefore any veteran who engages in the proscribed advocacy constitutes a special danger to the State. But while a union official or public employee may be deprived of his position and thereby removed from the place of special danger, the State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax exemption, he remains a veteran. The State, consequently, can act against the veteran only as it can act against any other citizen, by imposing penalties to deter unlawful conduct." The *Speiser* case, then, cannot be used as authority to support the claim that the 1955 Act involves a deprivation without procedural due process.

Since violation of the oath required by the 1931 Act is not a crime, the very concept of "shifting the burden of proof" would not seem to apply. A bare promise, the breach of which involves no criminal sanction, would hardly suffice to shift the burden of proof.

THE 1931 ACT INVOLVES NEITHER A DEPRIVATION OF SUBSTANTIVE DUE PROCESS NOR A DENIAL OF EQUAL PROTECTION UNDER THE LAW.

By drawing attention to certain parts of the pre-trial order, Employees, on pages 102 and 103 of their brief, have given the impression that aliens are forced to take the oath required by the 1931 Act.

This is not, in fact, correct. This is not the practice of the University of Washington and has not been the practice.

The pre-trial order must be read as a whole. Thus the statement of the President of the University of Washington (R. 175-179) and another paragraph of the pre-trial order (R. 159) must be read along with the portion where aliens are treated specifically. It reads, "For many years, the past practice at the University of Washington with regard to teaching faculty who are aliens, and *at all times material to this cause*, has been *similar* to that suggested by the memorandum circulated through the department of Mathematics and reproduced below." (Emphasis supplied.) The memorandum referred to points out that, "The last clause of the first sentence which reads, 'and undivided allegiance to the government of the United States' may be replaced by the phrase 'insofar as it is compatible with my citizenship in .....'" (R. 158-159). Who can say what other oath form would be "similar"? Yet, on page 103 of their brief, Employees actually state, "* * * the record is clear that an oath, perhaps a modified 1931 oath, has always been required of all alien-professors. * * *" This Court cannot pass on a "modified" oath, which is "similar" to the one set forth in the above memorandum. One thing is certain. The very word "modified" means that it is *not* the 1931 oath.

Thus, Employees' claim that this oath is arbitrary and hence void under the due process clause,

in that it requires aliens to take an oath of undivided allegiance to the United States, thereby placing them in the inconsistent position of averring undivided allegiance to one government while retaining the citizenship of their native country, falls of its own weight.

It is at least arguable that the legislature intended the words, "every person applying for a license to teach . . . ." to cover not "every person" in the broadest sense but every person who should owe allegiance to this country. It is to be noted that legislation was enacted prohibiting aliens from teaching *in the common schools* (chapter 38, Laws of 1919, RCW 28.67.010, *et seq.*) Three decades later, chapter 32, Laws of 1949 (RCW 28-.67.020, part) amended Section 1 of the 1919 act to allow exchange teachers *in the public schools* "irrespective of requirements respecting citizenship and oath of allegiance." Neither statute referred to institutions of higher education. This demonstrates that the Washington Legislature in 1949 assumed that the 1931 act did not apply to institutions of higher education. But, of course, whether the long-standing interpretation of the 1931 act by the administrative agencies—even though it is entitled to great weight—is the correct interpretation, is a question for the state courts.

Employees claim (App. Br. pp. 100-101) that if the 1931 oath does not apply to aliens as well as citizens the latter have been denied equal protection

of the laws. The question in all "equal protection" cases is whether a reasonable basis for an allegedly unconstitutional classification exists. *Phillips Chemical Co. v. Dumas Independent School District*, 361 U. S. 376; *Daniel v. Family Security Life Insurance Co.*, 336 U. S. 220; *N. Y. Rapid Transit Corp. v. City of New York*, 303 U. S. 573. The classification here is not only reasonable but tends to avoid possible unfairness to alien employees without in any way derogating from the constitutional rights of non-alien employees since the oath of allegiance as applied to them creates fewer problems.

## PART VII

## OTHER CONTENTIONS OF EMPLOYEES

### THE 1955 OATH REQUIREMENT DOES NOT CONSTITUTE A BILL OF ATTAINDER.

The omissions made by Employees' in interpreting *Cummings v. Missouri*, 71 U. S. (4 Wall.) 277, and *United States v. Lovett*, 328 U. S. 303, demonstrate the invalidity of their argument that Washington's disclaimer oath requirement is a bill of attainder.

Employees admit that the oath in this case is prospective and cite no case in which this court has found a prospective act to be a bill of attainder. The acts struck down in the *Cummings* and *Lovett* cases and in *Ex parte Garland*, 71 U. S. (4 Wall.) 333, all involved punishment for past misdeeds. It is true that the punishment for past misdeeds was often

conditioned on a future act, but in each case the individual punished could not have avoided the sanction. As one writer has pointed out in 28 Rocky Mt. L. Rev. 258:

> "Garland and Cummings could not alter the fact that they had supported the confederacy in the Civil War. Lovett, Dodd, and Watson could never again qualify as governmental employees whether they changed their loyalties or not."

The Employees', on page 103 of their brief have used, completely out of context, a quote from Justice Frankfurter's concurring opinion in *United States v. Lovett*, *supra*, to support their argument that a bill of attainder need not also be *ex post facto* in order to be objectionable. An additional few lines from that opinion demonstrate that the Employees' quote is not apposite. At page 323 of *U. S. v. Lovett*, Justice Frankfurter wrote:

> "Frequently a bill of attainder was thus doubly objectionable because of its ex post facto features. This is the historic explanation for uniting the two mischiefs in one clause—'No Bill of Attainder or ex post facto Law shall be passed.' No one claims that § 304 is an ex post facto law. If it is in substance a punishment for acts deemed 'subversive' (the statute, of course, makes no such charge) for which no punishment had previously been provided, it would clearly be ex post facto. Therefore, if § 304 is a bill of attainder it is also an ex post facto law. *But if it is not an ex post facto law, the reasons that establish that it is not are persuasive that it cannot be a bill of attainder. No offense is specified and no declaration of guilt is made.*" (Emphasis supplied.)

Whether or not that statement was applicable in the *Lovett* case, we submit that it is certainly applicable in the present case. In other words, the fact that the statutes involved in the present case are prospective is convincing evidence that the act was not an act of punishment but rather a regulatory act to control the future action of those coming under the act. A member of a subversive organization cannot claim that he is penalized merely because the state requires him to resign from a subversive organization as a condition of his employment by the state. The requirement of non-membership is reasonably related to the end sought: trustworthy public employees.

Employees wholly ignore the Washington Supreme Court's interpretation of the 1955 Act and the constitutional prohibition against bills of attainder. In *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10 (1959), the Washington Supreme Court followed *Garner v. Bd. of Public Works*, 341 U. S. 716, where this Court said on p. 720:

> "* * * The provisions operating thus *prospectively* were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende v. Board of Supervisors of Elections*, 341 U. S. 56, ante. Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service * * * *and a State is not without power to do as much.*" (Emphasis supplied.)

The fact is that the oath requirement in the present case works less of a hardship on the person affected than the ordinance and charter amendment involved in the *Garner* case, *supra;* for here a member of a subversive organization may resign today and take the oath tomorrow. Justices Burton's and Frankfurter's objections to the *Garner* ordinance are not present here.

If the oath was an employment qualification in the *Garner* case, it is an employment qualification here. In the *Douds* case, *supra*, the Court said on page 391 in upholding the "non-Communist" affidavit provision of the Taft-Hartley Act that voluntary affiliations and beliefs justify an inference concerning future conduct when drawn by the legislature on the basis of its investigations. If the oath was valid as regulating future conduct in the *Douds* case, it is so in the present case.

The Employees' brief contains considerable discussion about Bills of Attainder being prospective. However, there is a dearth of argument to show that the affidavit requirement constitutes a Bill of Attainder even assuming, *arguendo*, that one could be prospective. To begin with, Employees have not shown any punishment and punishment is certainly a prerequisite. Employees have shown nothing to negate the belief of the lower court that the oath requirement is a reasonable employment qualification. As Mr. Justice Frankfurter said in his concurring opinion in *United States v. Lovett*, *supra*, on page 324:

> "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony, *Hawker v. New York*, 170 U. S. 189, or because he is no longer qualified, *Dent v. West Virginia*, 129 U. S. 114."

Hence, even assuming, *arguendo*, that a bill of attainder could be prospective, the act in question is not a bill of attainder but is an employment qualification. This being true, it would be gratuitous comment for the court to comment on the possibility of "prospective bills of attainder." It would involve overruling, in part, several cases.

It is submitted that there is no merit to Employees' contention.

THERE HAS BEEN NO PRE-EMPTION OF THE 1955 ACT.

The holding in *Pennsylvania v. Nelson*, 350 U. S. 497, so heavily relied upon by the Employees, has been reduced to its precise facts by *Uphaus v. Wyman*, 360 U. S. 72, 76-77 and *Sweezy v. New Hampshire*, 354 U. S. 234.

The portion of the state statute involved in the pre-emption argument in the *Sweezy* and *Uphaus* cases, *supra*, is the same as Washington's. The *Uphaus* case in 1959 is the last case to discuss "pre-emption." There the Court stated that the pre-emption contention "was denied *sub silentio*" in *Sweezy*,

and thus, with these comparable statutes under consideration, the pre-emption argument appears foreclosed to Employees here as well. In *Uphaus*, at page 76, the court distinguished facts within the *Nelson* case from the case under consideration and stated:

> "* * * In *Nelson* itself we said that the 'precise holding of the court * * * is that the Smith Act * * * which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*' (Italics supplied.) 350 US, at 499. The basis of Nelson thus rejects the notion that it stripped the States of the right to protect themselves. All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. * * *"

The court proceeded, then, to enumerate areas which states could certainly legislate against. (For an excellent discussion of the *Nelson* and *Uphaus* cases and loyalty oath requirements in general see Professor Cramton's article in 43 Minn. L. Rev. 1025, 1959.)

The Employees' conclusion to their pre-emption argument as stated on page 203 of their brief that alien professors must take the Washington State Oath of Allegiance is an erroneous statement disproven by the records in this case, as shown in Part VI of this brief.

In answer to Employees second argument on pre-emption (App. Br. p. 198), if the State of Washington or any other state chooses to set up require-

ments for its employees which do not permit it to accept Federal monies for the teacher or student exchange programs it may be a detriment to the state; however it is incorrect to state that a refusal by the state to accept optional Federal monies for teacher or student exchanges so interferes with American foreign policy as to render the legislation upon which the refusal is based unconstitutional.

It is therefore submitted that Employees' argument concerning pre-emption should be denied.

THE 1955 ACT DOES NOT REQUIRE SELF-INCRIMINATION.

Employees' contention, that the 1955 statute is void as requiring plaintiffs to incriminate themselves with respect to their own disloyalty, is strained, without merit and should be rejected.

The state high court interpreted this statute in relation to the Fifth Amendment privilege against self-incrimination in *Nostrand v. Balmer*, 53 Wn. (2d) 460, 477, 335 P. (2d) 10, and found no merit in a similar contention. There the court stated:

> "Respondents are not compelled by section twelve to do anything. But, if they desire to remain in public employment, they must comply with the standards of eligibility established by the legislature, * * *"

The disclaimer oath would be relevant in a prosecution for perjury only as the occasion which Employees used to commit perjury.

Since Employees are not being required to give testimony against themselves, *Nostrand v. Balmer*,

*supra*, but are merely required, pursuant to the 1955 Act, to disclaim their knowing participation in subversive organizations, the statute does not impinge upon the Fifth Amendment privilege against self-incrimination. *Communist Party v. S.A.C. Board*, 367 U. S. 1; *Konigsberg v. State Bar of California*, 366 U. S. 36; *In re Anastaplo*, 366 U. S. 82; *Lerner v. Casey*, 357 U. S. 468; *Cohen v. Hurley*, 366 U. S. 117; *Beilan v. Board of Education*, 357 U. S. 399; *Gerende v. Election Board*, 341 U. S. 56.

Finally, there is a short but conclusive argument which must be mentioned:

> "It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action. * * *" *Adamson v. California*, 332 U. S. 46, 59; also *Twining v. New Jersey*, 211 U. S. 78, 91-98.

THE DISTRICT COURT WAS CORRECT IN DISMISSING EMPLOYEES' COMPLAINT WITH PREJUDICE.

The three-judge court properly refused to adjudicate questions involving the 1931 Act. *Martin v. Creasy*, 360 U. S. 219 (1959); *United Gas Pipeline Company v. Ideal Cement Company*, 369 U. S. 134 (1962); *Cf.* annotation, Remission of issues to state court, 3 L. ed. 2d 1827; (compare a similar order by this court in *Nostrand v. Little*, 362 U. S. 474 (1960) and 368 U. S. 436 (1962)). In any event, the dismissal with prejudice as to the 1931 Act only precludes the Employees from bringing another action

in the federal court until after the state court has authoritatively construed that act.

The lower court upheld the constitutionality of the 1955 Act and the dismissal with prejudice was the proper order with which to terminate the litigation. The Employee's contention is without merit.

THE DISTRICT COURT WAS CORRECT IN DISMISSING THE STUDENTS.

Allowing the students to challenge the constitutionality of the statutes involved here would do violence to a longstanding judicial principle. This Court observed in *United States v. Johnson*, 319 U. S. 302, 305, that it would refuse to decide any dispute which "does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court."

Accordingly, in *Poe v. Ullman*, 367 U. S. 497, this Court refused to pass upon the constitutionality of a state statute where the moving party was unable to show that he was threatened with its immediate enforcement.

The general principle from these cases is applicable here since the statutes challenged in this case have no direct application to students; have never been enforced against students and were not intended to affect students. The students cannot show even an indirect injury.

## CONCLUSION

The legislation is not perfect. It is controversial. Many doubt its wisdom. But it violates no constitutional provision and the route is open to legislative amendment and repeal. The wisdom of the statute is, of course, a matter for the legislature, not the courts. See *Daniel v. Family Security Life Ins. Co.*, 336 U. S. 220, at p. 224. There is no reason for Employees to lose faith in the democratic process, a process which repeals oath requirements as well as creates oath requirements. They should not be permitted to avoid the "rough and tumble" of the legislature through this judicial challenge.

This Court should affirm the lower court with regard to its disposition of the challenge to the 1931 Act. Should this Court find that a justiciable controversy exists with regard to the 1955 Act, this Court should affirm the lower court's decision in that regard as well.

Respectfully submitted,

JOHN J. O'CONNELL,
*Attorney General.*

HERBERT H. FULLER,
*Deputy Attorney General.*

DEAN A. FLOYD,
*Assistant Attorney General.*

*Attorneys for Appellees.*